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THE SEVENTH CIRCUIT STEPS UP ON CLEANUP OF HAZARDOUS WASTE

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INTRODUCTION

The Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”) of 1980¹ was initially created in response to the discovery of the Love Canal environmental disaster.² Reacting to public outcry and growing awareness of the negative impact of environmental wastes, Congress hurriedly addressed the dangers of hazardous waste through CERCLA.³ In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (“SARA”) of CERCLA.⁴

CERCLA allows various parties, either private or public, to bring a claim for recovery under Sections 107 and 113. Section 107(a) is the

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¹ 42 U.S.C. § 9607 (2000).

² Andrew R. Klein, *Hazardous Waste Cleanup and Intermediate Landowners: Reexamining the Liability-Based Approach*, 21 HARV. ENVTL. L. REV. 337, 340-41. (1997).

³ *Id.* at 341.

⁴ In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (“SARA”), Pub. L. No. 99-499, 100 Stat. 1613 (1986). Congress extended the reauthorization in 1990. *See* Pub. L. No. 101-508, t.t. XI, § 1123(d), 104 Stat. 1388-455 (1990).

original cost recovery provision of CERCLA.⁵ Section 113(f) was added in 1986 as a part of SARA to allow contribution rights for parties liable under CERCLA.⁶ Section 107(a) provides that “covered persons” may be held liable for “any other necessary costs of response incurred by any other person consistent with the national contingency plan.”⁷ Section 113(f) states that “[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person.”⁸

Within the cost-recovery framework, the two overriding goals are to promote efficiency in environmental cleanup and make the “polluter pay” by ensuring that those responsible bear the costs of creating the hazard.⁹ As conflicting cases illustrate, each court has applied the various methods of statutory construction to reach different conclusions regarding either Potentially Responsible Party (“PRP”) or “innocent landowner” recovery and liability.¹⁰

Although the Supreme Court has not provided specific guidance for CERCLA interpretation, it is not a proponent of applying the “remedial canon” of statutory construction.¹¹ Nonetheless, a majority of lower courts apply the “remedial canon,” which instructs courts to

⁵ 42 U.S.C. § 9607(a)(4)(A); 42 U.S.C. § 9613(f)(1).

⁶ 42 U.S.C. § 9613(f)(1).

⁷ 42 U.S.C. § 9607(a)(4)(A).

⁸ 42 U.S.C. § 9613(f)(3)(B).

⁹ Blake A. Watson, *Liberal Construction of CERCLA under the Remedial Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 279-285 (1996).

¹⁰ *Metro. Water Reclamation of Greater Chicago v. N. Am. Galvanizing & Coating, Inc.*, 473 F.3d 824, 830, 831, 837 (7th Cir. 2007); *Atl. Research Corp. v. United States*, 459 F.3d 827, 835-37 (8th Cir. 2006); *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 522, 543 (3d Cir. 2006); *Consol. Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 100, 103-04 (2d Cir. 2005); *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1240, 1243 (7th Cir. 1997); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764, 770-71 (7th Cir. 1994).

¹¹ *Atl. Research Corp. v. United States*, 127 S.Ct. 2331, 2332 (2007); *Cooper Indus., Inc. v. Aviall servs. Inc.*, 543 U.S. 147, 160 (2004).

interpret the statute to “achieve the statutes’ broadest underlying purpose.”¹² Courts applying this canon interpret CERCLA to remedy pollution at any cost.¹³

Unlike the majority of courts, the Seventh Circuit applies the “public choice” theory, which instructs courts to consider statutes as “product[s] of compromise.”¹⁴ Courts seeking to enforce the bargains reached between the legislature and interest groups achieve a middle ground in statutory construction.¹⁵ *Metropolitan Water Reclamation District v. North American Galvanizing & Coating, Inc.* is a classic illustration of the Seventh Circuit’s unique “public choice” approach.¹⁶ The factual underpinnings in *Metropolitan Water* are such that no overwhelming interest overpowers another.¹⁷ This allows the Seventh Circuit to reach a perfect balance between the two broad goals of CERCLA.¹⁸

In other circumstances, the Seventh Circuit has applied the “remedial canon” within the framework of the “public choice” theory for the limited purpose of avoiding an absurd result.¹⁹ For example, the Seventh Circuit created the *Akzo/Rumpke* “innocent landowner” exception when none of the other circuits allowed recovery under Section 107(a).²⁰ In doing so, the Seventh Circuit avoided rendering Section 107(a) recovery a nullity.²¹ These cases confirm the merit of the Seventh Circuit’s application of the “public choice” theory.²²

¹² *Atl. Research Corp.*, 459 F.3d at 834, 835, 837; *E.I. DuPont de Nemours & Co.*, 460 F.3d at 522-23, 545; *Consol. Edison Co. of N.Y.*, 423 F.3d at 98-99, 103.

¹³ *E.I. DuPont.*, 460 F.3d at 522-23, 545.

¹⁴ *Metro. Water*, 473 F.3d at 824, 834, 836-37; *Rumpke*, 107 F.3d at 1241-42; *Akzo*, 30 F.3d at 770-71.

¹⁵ See Watson, *supra* note 9, at 217-18.

¹⁶ *Metro. Water*, 473 F.3d at 834, 836-37.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Rumpke*, 107 F.3d at 1241-42; *Akzo*, 30 F.3d at 770-71.

²⁰ *Rumpke*, 107 F.3d at 1239-40; *Akzo*, 30 F.3d at 770.

²¹ *Rumpke*, 107 F.3d at 1239-40; *Akzo*, 30 F.3d at 770.

²² *Metro. Water*, 473 F.3d at 834, 836-37; *Rumpke*, 107 F.3d at 1239-40; *Akzo.*, 30 F.3d at 770.

Part I of this article will discuss the context from which CERCLA was born, how most courts construe CERCLA through the “remedial canon,” and the Seventh Circuit’s views on CERCLA. Part II of this article will address the context of *Metropolitan Water*. Part III of this article will discuss the *Akzo/Rumpke* exception. Part IV of this article will discuss the implications of the Seventh Circuit’s ruling in *Metropolitan Water*.

PART I

This section will discuss the enactment of CERCLA.

A. CERCLA’s Enactment

CERCLA is a combination of different bills considered in both the House and Senate during the end of the Carter Administration.²³ House Report 7020 proposed to create a “superfund” to help finance the cleanup of hazardous dumps.²⁴ The House Report accompanying House Report 7020 begins with a detailed discussion of the need for legislation to respond to “the tragic consequences of improper[], negligent[], and reckless[] hazardous waste disposal practices . . . and the inadequacy of existing law.”²⁵ The more “remedial” Senate Bill 1480, which provided for strict liability was struck down.²⁶

A comparison of the Bills drafted by the House and the Senate before the November 1980 election reveals Congress’s differences of opinion on many key points.²⁷ The House Bill relied on a common law

²³ See Watson, *supra* note 9, at 290.

²⁴ See 1 LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) v-vii (1983) [hereinafter HISTORY OF CERCLA]; Watson, *supra* note 9, at 290.

²⁵ See H.R. REP. NO. 96-1016, at 17 (1980), *reprinted in* 2 HISTORY OF CERCLA, *supra* note 24, at 48.

²⁶ See S. REP. NO. 96-848, at 37 (1980), *reprinted in* HISTORY OF CERCLA, *supra* note 24, at 343.

²⁷ John Copeland Nagle, *CERCLA’S MISTAKES*, 38 WM. & MARY L. REV. 1405, 1443-44 (1997).

causation scheme, but the House Bill did not.²⁸ The House Bill contained a third party defense to liability while the Senate Bill did not.²⁹ The House Bill included a provision governing the apportionment of liability among defendants, but the Senate Bill did not.³⁰ The Senate Bill specifically attempted to impose “joint and several liability” while the House did not.³¹

Under time pressure, Congress compromised by striking down the most aggressive proposals in both the House and Senate in order to ensure CERCLA’s passage.³²

B. Statutory Scheme

Section 107(a)(4)(A) provides that PRPs shall be liable for “all costs of removal or remedial action incurred by the United States Government or a state or an Indian Tribe not inconsistent with the national contingency plan.” Section 107(a)(4)(B), which governs private suits, provides that PRPs shall be liable “for any other necessary costs of response incurred by any other person consistent with the national contingency plan.”³³ To establish a prima facie case for cost recovery under Section 107(a)(4)(B), a private plaintiff must prove four elements: 1) the site at issue is a “facility;” 2) a release or threatened release of hazardous substance has occurred; 3) release has caused the plaintiff to incur “necessary costs of response” consistent with National Contingency Plan (“NCP”) and 4) the defendant falls

²⁸ See Nagle, *supra* note 27, at 1443-44.

²⁹ See Nagle, *supra* note 27, at 1443-44; Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 6, 16-17, 19 (1982).

³⁰ See Nagle, *supra* note 27, 1443-44; Grad, *supra* note 29, at 5, 10, 17, 19.

³¹ See Nagle, *supra* note 27, 1443-44; Grad *supra* note 29, at 7, 10, 19.

³² See Nagle, *supra* note 27, 1443-44.

³³ 42 U.S.C. § 9607(a)(4)(B).

within one of the four categories of covered persons within Section 107(a)(1)-(4).³⁴

Section 113(f)(1) is a provision of SARA, which provides that a contribution action could be brought “during or following any civil action under Section [106] of this title or under Section [107(a)] of this title.”³⁵ Section 113(f)(3)(B), which governs contribution rights, states that a “person who has resolved its liability with the United States or a State for some or all of the response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person.”³⁶

Despite Congress’s deletion of any references to “strict liability,” lower courts interpreted the 1986 SARA as a reaffirmation of “strict liability.” The reasoning behind this assumption stems from SARA’s impractical defenses for PRPs: acts of God, acts of war, act of third parties not in a contractual relationship with the defendant, any combination of the above as well as immunity for third-parties.³⁷ Nonetheless, courts have often characterized liability as “strict” and “joint and several.”³⁸ “Joint and several” liability means that each and every contributor is potentially liable for the entire cleanup.³⁹ Likewise, “strict liability” holds each PRP responsible for their actions.⁴⁰

³⁴ Ronald G. Aronovsky, *Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 *ECOLOGICAL L.Q.* 1, 17, 18 (2006); *NutraSweet Co. v. X-L Engineering Co.*, 227 F.3d 776, 784-85 (7th Cir. 2000).

³⁵ 42 U.S.C. § 9613(f)(1).

³⁶ 42 U.S.C. § 9613(f)(1); 42 U.S.C. § 9613(f)(3)(B).

³⁷ 42 U.S.C. § 9607(b)(3); See Aronovsky, *supra* note 34, at 14.

³⁸ 42 U.S.C. § 9607(a)(1); 4 WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES* § 8.13 (1992).

³⁹ 42 U.S.C. § 9601; 42 U.S.C. § 9607(a)(1).

⁴⁰ 42 U.S.C. § 9601; 42 U.S.C. § 9607(a)(1).

PART II

Part II will discuss the background, factual circumstances, and holdings in the circuit court split involving whether a PRP, who voluntarily commences cleanup, has the right to seek response costs under Section 107(a).

In *Cooper Industries v. Aviall Services Inc.*, Cooper Industries owned four Texas properties until 1981 when it sold them to Aviall Services, Inc.⁴¹ After operating those sites for several years, Aviall discovered that both it and Cooper had contaminated the property.⁴² As a result, hazardous substances leaked into the ground and ground water.⁴³ Aviall notified the state of the contamination, but neither the state nor the federal government took judicial or administrative measures to compel cleanup.⁴⁴ Subsequently, Aviall brought a Section 113(f) contribution claim against Cooper after voluntarily commencing cleanup.⁴⁵

On December 13, 2004, the Supreme Court issued the much-anticipated decision in *Cooper* and held that a person may not seek contribution for CERCLA response costs under Section 113(f)(1) in the absence of a prior civil action.⁴⁶ Previously, lower courts had construed Section 113 of CERCLA to allow assertion of contribution claims by one PRP against another.⁴⁷ As construed in the past, Section 107 of CERCLA allowed only those parties that are not liable under CERCLA to pursue cost recovery against parties who are potentially liable.⁴⁸

The Supreme Court in *Cooper* significantly limited the availability of the CERCLA contribution remedy created by Section

⁴¹ *Cooper Industries, Inc. v. Aviall Services, Inc.* 543 U.S. 157, 164-65 (2004).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 166.

⁴⁷ *Id.* at 164-65.

⁴⁸ *Id.* at 169-170.

113⁴⁹—it is no longer available to parties who have conducted response actions at CERCLA sites without entering a judicial or administrative settlement.⁵⁰ Post *Cooper*, courts have addressed the narrow issue of whether a PRP had a right to bring an action against another PRP for response costs under Section 107 (a).⁵¹

A. The Circuit Court Split on Response Costs under Section 107(a)

Given these two provisions, three out of four federal circuit courts considering the issue ruled in favor of allowing PRPs to pursue Section 107(a) claims against other PRPs: the Second Circuit in *Consolidated Edison Co. of New York v. UGI Utilities, Inc.*; the Eighth Circuit in *Atlantic Research Corp. v. United States*; and the Seventh Circuit in *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.*⁵² Each case involved a PRP who performed voluntary cleanup.⁵³

In *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, Metropolitan Water Reclamation was a water district that owned a 50 acre parcel of land in Forest View, Illinois.⁵⁴ It entered into a long-term lease with Lake River Corporation, a wholly owned subsidiary of North American.⁵⁵ Lake River developed the property, constructing a facility to store, mix and package industrial chemicals for its own use and for the use of its

⁴⁹ *Id.* at 166-67

⁵⁰ *United States v. Atl. Research Corp.*, 127 S.Ct. 2331, 2338 (2007).

⁵¹ *Atl. Research Corp. v. United States*, 459 F.3d 827, 836-37 (8th Cir. 2006); *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 543 (3d Cir. 2006); *Consol. Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 103-04 (2d Cir.2005); *Metro. Water Reclamation of Greater Chicago v. N. Am. Galvanizing & Coating, Inc.*, 473 F.3d 824, 837 (7th Cir. 2007); *Cooper*, 543 U.S. at 166.

⁵² *Atl. Research*, 459 F.3d 827 at 836-37; *E.I. DuPont*, 460 F.3d 515 at 543; *Consol. Edison*, 423 F.3d 90 at 103-04; *Metro. Water*, 473 F.3d 824 at 837.

⁵³ *Atl. Research*, 459 F.3d 827 at 836-37; *E.I. DuPont*, 460 F.3d 515 at 543; *Consol. Edison*, 423 F.3d 90 at 103-04; *Metro. Water*, 473 F.3d 824 at 837.

⁵⁴ *Metro. Water*, 473 F.3d at 825-827.

⁵⁵ *Id.*

customers.⁵⁶ Lake River's operations involved accepting by truck, barge, and rail, large amounts of chemicals that it held in above-ground storage tanks located on the property.⁵⁷ The Water District alleged that over the course of Lake River's tenancy, the tank allegedly spilled 12,000 gallons of industrial chemicals into the soil and groundwater.⁵⁸ The water district alleged that it had "incurred substantial expenses investigating, monitoring and remediating the contaminated portions of the property."⁵⁹ Subsequently, the water district sued under Section 107(a) and Section 113(f) to recover costs that it voluntarily incurred on property that it had leased to a corporation.⁶⁰

Similarly, in *Consolidated Edison Co. of N.Y. v. UGI Utilities, Inc.*, appellant company, Consolidated Edison Co. sought to be reimbursed by UGI Utilities Inc. for costs it incurred cleaning up certain contaminated sites in Westchester County, New York.⁶¹ Consolidated Edison Co. alleged that UGI or its predecessors operated the Westchester plants and that UGI should be liable for costs under CERCLA.⁶² UGI moved for summary judgment on Consolidated Edison, finding that no reasonable juror could conclude that UGI is subject to operator liability under CERCLA with respect to the Westchester Plants not located in Yonkers.⁶³ The district court granted UGI's motion for summary judgment in its entirety and Consolidated Edison appealed to the Supreme Court.⁶⁴

Likewise, in *Atlantic Research Corp. v. United States*, appellant research corporation retrofitted rocket motors for the United States

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Consol. Edison Co. of N.Y. v. UGI Utilities, Inc.*, 423 F.3d 90, 93-4 (2d Cir. 2005).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

from 1981 and 1986.⁶⁵ It performed this service in Camden, Arkansas.⁶⁶ The work included using high-pressure water spray to remove rocket propellant.⁶⁷ Once removed, the propellant was burned. Residue from burnt rocket fuel contaminated the Arkansas site's soil and groundwater.⁶⁸ Appellant sought to recover a portion of the costs of cleanup from the United States.⁶⁹ The District Court for the Western District of Arkansas denied their claims.⁷⁰ Subsequently, appellant Atlantic Research Corp. sought response costs from appellee United States for costs under the CERCLA.⁷¹

Although the Second, Seventh, and Eighth Circuit Courts of Appeals provided PRPs with standing within CERCLA, the remedies they envisioned were vague and varied as to the type of recovery a PRP could claim under Section 107(a).⁷² The Second Circuit noted that "it no longer made sense to view Section 113(f)(1) as the means by which the Section 107(a) cost recovery remedy is effected by parties that would themselves be liable if sued under Section 107(a)."⁷³ The Eighth Circuit agreed with the Second Circuit, but clarified that a PRP has a cause of action under Section 107(a) based on both the theory of cost-recovery and an implied contribution theory.⁷⁴ The Eighth Circuit opened another avenue of recovery, stating that "if a plaintiff attempted to use [Section] 107 to recover

⁶⁵ *Atl. Research Corp. v. United States*, 459 F.3d 827, 829-30 (8th Cir. 2006).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 835-36 (8th Cir. 2006); *Consol. Edison Co. of N.Y. v. UGI Utils. Inc.*, 423 F.3d 90, 99 (2d Cir. 2005); *Metro. Water Reclamation of Greater Chicago v. N. Am. Galvanizing & Coating, Inc.*, 473 F.3d 824, 836 (7th Cir. 2007).

⁷³ *Consol. Edison Co. of N.Y. v. UGI Utils. Inc.*, 423 F.3d 90, 99 (2d Cir. 2005).

⁷⁴ *Atl. Research Corp.*, 459 F.3d at 835-36; *Consol. Edison Co. of N.Y.*, 423 F.3d at 99.

more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under [Section] 113(f).”⁷⁵

Similarly, the Seventh Circuit has its own unique liability scheme.⁷⁶ The Seventh Circuit in *Metropolitan Water* decided that Metropolitan Water’s action under Section 107 is characterized more appropriately as a cost-recovery action than as a claim for contribution.⁷⁷ The Seventh Circuit explained its hesitancy to label Metropolitan Water’s right of action under Section 107 as an “implied right to contribution.”⁷⁸ First, the Seventh Circuit in *Metropolitan Water* noted that the Supreme Court in *Key Tronic Corp. v. United States* found “the statute now expressly authorizes a cause of action for contribution in [Section] 113 and impliedly authorizes a similar and somewhat overlapping remedy in [Section] 107.”⁷⁹ For this reason, the Seventh Circuit differed from the Northern District’s opinion that labeled the cause of action under Section 107 as an “implied right to contribution.”⁸⁰

Rather, the Seventh Circuit construed the applicable tort law imposing liability “under the technical definition of contribution at common law” providing that a “volunteer who is not liable may not pursue [a] contribution [claim].”⁸¹ For the Seventh Circuit, “Section 107 (a) only imposes liability on private parties to the extent that there have been “necessary costs of response” already incurred.”⁸² “If no costs qualifying under this language have been incurred or awarded against the volunteer, then that party has no right to contribution.”⁸³

In the Third Circuit *E.I. DuPont De Nemours & Co. v. United States*, appellants, E.I. Dupont were facility owners and operators of

⁷⁵ *Atl. Research Corp.*, 459 F.3d at 835-36.

⁷⁶ *Metro. Water*, 473 F.3d at 836.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 832; *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994).

⁸⁰ *Metro. Water*, 473 F.3d 824 at 836.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

industrial facilities located throughout the United States that are contaminated with hazardous waste.⁸⁴ E.I. DuPont alleged that the government was responsible for contamination and sought to recover a share of the cleanup costs under Section 107(a) and Section 113(f).⁸⁵ The District Court entered summary judgment for the government, and E.I. DuPont appealed.⁸⁶

The Third Circuit discussed the basis for precluding PRPs from pursuing a claim under Section 107(a).⁸⁷ Drawing a distinction between a “sua sponte” environmental cleanup where a PRP undertakes cleanup without governmental involvement and a “negotiated settlement,” the Third Circuit interpreted SARA to favor settlement.⁸⁸ For the Third Circuit, Congress and not the courts create the incentives for environmental cleanups.”⁸⁹

B. The Circuit Court Split over the type of PRP liability

The Supreme Court in *Cooper Industries, Inc. v. Aviall Services, Inc.* took notice of the opportunity to impose a type of PRP liability.⁹⁰ The Court recognized the issue of whether Cooper Industries, which sought to recover a share of its cleanup costs, may pursue a Section 107(a) recovery action under CERCLA for some form of liability other than ‘joint and several’ liability.⁹¹ However, Supreme Court expressly left this question open and stated that “we think it prudent to withhold judgment on these matters.”⁹²

⁸⁴ E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 525-528 (3rd Cir. 2006).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 542-45.

⁸⁸ *Id.* at 523, 537-40, 541-545.

⁸⁹ *Id.*

⁹⁰ *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 169-70 (2004).

⁹¹ *Id.*

⁹² *Id.* at 170.

Court precedents have encompassed two liability methods: either “several liability” or “joint several liability.”⁹³ Courts have justified construing Section 107(a) to allow “joint and several recoveries” where the plaintiff may recover 100 % of response costs.⁹⁴ However, courts denying PRPs from bringing a claim under Section 107 justified their holdings on the basis that Congress could not have intended to let some PRPs recover all of the response costs.⁹⁵ Understandably, there is disagreement among the Second, Eighth, and Seventh Circuit Courts over PRP liability under Section 107(a).⁹⁶

The Second Circuit in *Consol. Edison* found that Section 107(a) allowed for full recovery under the theory of “joint and several liability” by any person that incurred costs for cleanup.⁹⁷ The Second Circuit does not require plaintiffs’ innocence to receive full costs.⁹⁸ Also, legal actions under Section 107(a) should be permitted in order to facilitate a counterclaim under Section 113(f)(1), which is a vehicle for offsetting contribution claims against another fellow PRP.⁹⁹

On the other hand, the Eighth Circuit imposed “several liability” on PRPs.¹⁰⁰ As the Eighth Circuit noted, “the text of § 107(a)(4)(B) permits recovery of ‘any other necessary costs of response . . . consistent with the national contingency plan.’”¹⁰¹ Such a PRP may not use Section 107 to recover its full response costs.¹⁰²

⁹³ *Atl. Research Corp. v. United States*, 459 F.3d 827, 835 (8th Cir. 2006); *E.I. DuPont de Nemours & Co.*, 460 F.3d at 522; *Consol. Edison Co. of N.Y. v. UGI Utils. Inc.*, 423 F.3d 90, 100 (2d Cir. 2005).

⁹⁴ *E.I. DuPont.*, 460 F.3d at 522; *Consol. Edison*, 423 F.3d at 100.

⁹⁵ *E.I. DuPont*, 460 F.3d at 522.

⁹⁶ *Atl. Research Corp.*, 459 F.3d at 835; *E.I. DuPont*, 460 F.3d at 522; *Consol. Edison*, 423 F.3d at 100; *Metro. Water*, 473 F.3d at 837.

⁹⁷ *Consol. Edison*, 423 F.3d at 100.

⁹⁸ *Id.* at 99.

⁹⁹ *Id.* at 100.

¹⁰⁰ *Atl. Research Corp.*, 459 F.3d at 835.

¹⁰¹ *Id.*

¹⁰² *Id.*

Contrary to both the Eighth and Second Circuit, the Third Circuit in *E.I. Dupont DeNemours & Co. v. United States* imposed “joint and several” liability on PRPS under Section 107(a).¹⁰³

C. What the Supreme Court Left Open and the Seventh Circuit’s Treatment of the Topic

The Supreme Court in the June 2007 decision of *Atlantic Research* re-affirmed the Eighth Circuit’s decision along with the Second Circuit and Seventh Circuit’s narrow holding.¹⁰⁴ The Supreme Court abrogated the Third Circuit Court’s decision in *E.I. DuPont* by holding that the plain terms of Section 107(a) allowed a PRP to recover costs from other PRPs.¹⁰⁵ However, the Supreme Court avoided deciding what type of PRP liability to impose under Section 107(a) for a PRP that voluntarily commenced environmental cleanup.¹⁰⁶

On this narrow question, the Seventh Circuit in *Metropolitan Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc.* avoided imposing a specific type of liability upon a PRP, who has voluntarily commenced environmental cleanup under Section 107(a).¹⁰⁷ In light of how *Cooper Industries, Inc. v. Aviall Services, Inc.* had foreclosed recovery via an action under Section 113(f), the Seventh Circuit found the “innocent landowner” exceptions to be of “little value.”¹⁰⁸ However, the Seventh Circuit in *Metropolitan Water* has not overruled a Section 107(a) claim for an “innocent landowner.”¹⁰⁹ Within the narrow context of PRP liability,

¹⁰³ *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 522 (3d Cir. 2006).

¹⁰⁴ *United States v. Atl. Research Corp.*, 127 S.Ct. 2331, 2332 (2007).

¹⁰⁵ *Id.* at 2332; *E.I. Dupont*, 460 F.3d at 544-45.

¹⁰⁶ *Atl. Research Corp.*, 127 S.Ct. at 2339.

¹⁰⁷ *Metro. Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc.* 473 F.3d 824, 836-37 (7th Cir. 2007).

¹⁰⁸ *Metro. Water*, 473 F.3d at 836-37; *Cooper Industries, Inc. v. Aviall Services, Inc.* 543 U.S. 157, 166 (2004).

¹⁰⁹ *Metro. Water*, 473 F.3d at 836-37.

the only fact that matters after the Seventh Circuit's overruling of the prior exceptions is whether the landowner had voluntarily commenced environmental cleanup.¹¹⁰

PART III

First, this section will discuss the context and tradition from which the Seventh Circuit created the "innocent landowner" exception in *Akzo* and *Rumpke*. Next, this article will discuss the other courts' reactions to the Seventh Circuit's judicially created exceptions.

A. Creation of the *Akzo* Exception

In *Akzo Coatings, Inc. v. Aigner Corp.*, innocent landowners forced to cleanup hazardous wastes caused by third party acts or migrations from adjacent lands were granted a cause of action under Section 107(a).¹¹¹ The holding in *Akzo* arose after *Akzo Coatings, Inc.* completed emergency clean-up work by the government and was ordered to perform more clean-up work at hazardous sites in Indiana.¹¹² *Akzo Coatings, Inc.* brought suit for contribution against *Aigner Corporation* and a number of other companies that sent hazardous wastes to various facilities in Kingsbury, Indiana between 1972 and 1985.¹¹³

Prior to *Akzo*, courts uniformly decided that a PRP could not sue under Section 107(a) against another PRP.¹¹⁴ However, these courts failed to resolve the question of whether an "innocent landowner" could bring a cause of action under Section 107(a).¹¹⁵ Thus, the

¹¹⁰ *Id.* at 836-37.

¹¹¹ *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 770-71 (7th Cir. 1994).

¹¹² *Akzo*, 30 F.3d at 762-64.

¹¹³ *Id.* at 762-64.

¹¹⁴ *See* Aronovsky, *supra* note 34, at 31.

¹¹⁵ *Id.*

Seventh Circuit in *Akzo* was the only circuit court that appeared to be concerned about this issue.¹¹⁶

Three years later in *Rumpke of Indiana Inc. v. Cummins Engine Co., Inc.*, the Seventh Circuit again permitted an innocent landowner to bring a cause of action for recovery against a PRP under Section 107(a).¹¹⁷ The holding in *Rumpke* arose when Rumpke purchased a 273-acre dump known as Uniontown Landfill from Geroge and Ethel Darlage. At that time, the Darlages informed Rumpke that the landfill had never accepted hazardous waste. Rumpke did not conduct its own inspection of the land for environmental hazards prior to the sale.¹¹⁸ In 1990, Rumpke alleged it had discovered a cocktail of hazardous wastes deposited at Uniontown for many years.¹¹⁹ A consent decree was approved in *United States v. Seymour Recycling Corp.* that resolved all obligations and responsibilities of the settling companies with respect to “the Seymour site.”¹²⁰ The present case arose because Rumpke pursued response costs from the Seymour settling parties, Cummins, Ford Motor Company, International Business Machines Corp., General Motors Corp., and Essex Group, Inc.¹²¹

Together *Akzo Coatings, Inc. v. Aigner Corp.* and *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.* created the well-known innocent landowner *Akzo/Rumpke* exception, which was affirmed by subsequent cases.¹²² In *Am International v. Datacard Corp.*, the Seventh Circuit applied the “*Akzo*-exception” by allowing an “innocent landowner” to directly sue for response costs.¹²³ Judge

¹¹⁶ *Akzo*, 30 F.3d at 770-771.

¹¹⁷ *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1243 (7th. 1997).

¹¹⁸ *Id.* at 1236-38.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1236-1238; *United States v. Seymour Recycling Corp.*, 554 F.Supp. 1334 (S. D. Ind. 1982).

¹²¹ *Rumpke*, 107 F.3d at 1236-38.

¹²² *NutraSweet Co. v. X-L Engineering Co.*, 227 F.3d 776, 791-792 (7th Cir. 2000); *Rumpke*, 107 F.3d at 1243.; *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 770-71 (7th Cir. 1994).

¹²³ *Am. Inter., Inc. v. Datacorp.*, 106 F.3d 1342, 1346-47 (7th Cir. 1997).

Posner found the Datacard Corporation “a little less innocent” than the landowner in *Akzo* because Datacard knew of the future expensive cleanup before purchasing the property.¹²⁴

B. Courts’ Attitude towards the “Akzo-Exception”

The Second Circuit in *Bedford Affiliates v. Sills* declined to recognize a defense for landowners who did not actively contribute to the resulting contamination.¹²⁵ To do so would mean carving out a judicially created defense that Congress did not create.¹²⁶ Like the Second Circuit, the Eighth Circuit in *Dico Inc. v. Amoco Oil Co.* prohibited against any expansion of the list of defenses beyond those expressed in CERCLA.¹²⁷ An expansion would constitute an improper judicial effort to eschew the underlying purpose of CERCLA.¹²⁸

Some courts have even expressly rejected the Seventh Circuit’s “Akzo-exception.”¹²⁹ The Ninth Circuit in *Western Property Services Corp. v. Shell Oil Co.* found the “Akzo-exception” inconsistent as a comprehensive scheme for adjusting the burden among parties liable for Section 107(a) recoveries.¹³⁰ For this reason, the Ninth Circuit refused to acknowledge any “non-polluting PRP landowner exception.”¹³¹ Instead, the Ninth Circuit held that a PRP may only recover costs under Section 113 as a contribution action under CERCLA.¹³² A proponent of the federal common law, the Ninth

¹²⁴ *Id.* at 1347.

¹²⁵ *Bedford Affiliates v. Sills*, 156 F.3d 416, 424-25, 432 (2d Cir. 1998).

¹²⁶ *Id.*

¹²⁷ *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 532 (8th. Cir. 2003).

¹²⁸ *Id.*

¹²⁹ *W. Properties Service Corp. v. Shell Oil Co.*, 358 F.3d 678, 690, 692 (9th Cir. 2004).

¹³⁰ *Id.* at 690, 692.

¹³¹ *Id.* at 692.

¹³² *Id.*

Circuit characterized the “innocent landowner” exception as applying to reach equitable rather than textually supported purposes.¹³³

PART IV

Many commentators consider the cost provisions of Section 107(a) and Section 113(f) to be the most remedial provisions of CERCLA since they deal directly with both overriding goals of CERCLA—cleanup and allocation of responsibility.¹³⁴ Nonetheless, the Supreme Court has always disfavored applying the remedial canon of statutory interpretation.¹³⁵ In the 1960 decision of *United States v. Republic Steel Corp.*, the Supreme Court held that the Rivers and Harbors Act of 1899 must be read “charitably in light of the purpose to be served” for granting relief and enjoining defendant pollutants from creating pollution.¹³⁶ Subsequently in *Key Tronic Corp. v. United States*, the Supreme Court held that petitioner pollutant was not entitled to attorney’s fees from the U.S. government because neither Section 107 nor Section 113 expressly mentioned recovery for attorney’s fees.¹³⁷ At no point in the decision did the Supreme Court respond affirmatively to the lower court’s assertion that Section 107 should be liberally construed to achieve the overall objectives of the statute.¹³⁸

Similarly, Judge Easterbrook and Judge Posner’s skepticism of purpose arguments especially within CERCLA arises from Judge Easterbrook’s view of legislation as a product of compromise.¹³⁹ As Judge Easterbrook stated, “[e]ven if all legislative history points in one

¹³³ *Id.* at 690.

¹³⁴ See Watson, *supra* note 9, at 286.

¹³⁵ *Key Tronic Corp. v. United States*, 511 U.S. 809, 818-20 (1994); *United States v. Republic Steel Corp.*, 362 U.S. 482, 491-92 (1960).

¹³⁶ 362 U.S. at 491-92.

¹³⁷ 511 U.S. at 818-20.

¹³⁸ *Id.* at 818-20.

¹³⁹ Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994).

direction, it is still necessary to find the compromise to learn the meaning of the statute.”¹⁴⁰ Similarly, Judge Posner interpreted the “public choice theory” to mean that courts “should enforce the bargains reached between the legislature and interest groups.”¹⁴¹

As Judge Posner further elaborated, “legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare, whether ‘welfare’ is defined as wealth, utility, or some other version of equity or justice.”¹⁴² For the Seventh Circuit, the broadening of rights for environmentally-aggrieved parties “serve[d] as a necessary and valuable supplement to legislative efforts to restore the natural ecology of our cities and countryside.”¹⁴³

Judge Posner’s primary objection to the “remedial canon” is how fails to take into account the role of interest groups “whose clashes blunt the thrust of many legislative initiatives.”¹⁴⁴ The Seventh Circuit’s views are supported by the leading drafter of CERCLA, former vice president Al Gore, who considered the development of a federal common law interpreting CERCLA to be “improbable.”¹⁴⁵ Concurring with this notion, Judge Easterbrook “does not believe that CERCLA is the kind of statute in which Congress intended to rely on the courts to fill in the gaps through a common law process.”¹⁴⁶ Rather, under the Seventh Circuit’s view, while many statutory questions remain unanswered, no goal is pursued at all costs.¹⁴⁷

¹⁴⁰ See Watson, *supra* note 9, at 247.

¹⁴¹ See *id.* at 217.

¹⁴² Richard A. Posner, *Economics, Politics, And The Reading Of Statutes And The Constitution*, 49 U. CHI. L. REV. 263, 265-66 (1982).

¹⁴³ Robert L. Glicksman, *A Retreat From Judicial Activism: The Seventh Circuit And The Environment*, 63 CHI.-KENT L. REV. 209, 220-21 (1987); *Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107, 1120 (7th Cir. 1976).

¹⁴⁴ Richard A. Posner, *Statutory Interpretation-In the Classroom and In the Courtroom*, 50 U. CHI. L. REV. 800, 809 (1983).

¹⁴⁵ See Nagle, *supra* note 27, at 1444-45.

¹⁴⁶ See *id.* at 1444-45.

¹⁴⁷ See *id.* at 1439-40.

A. How the Seventh Circuit employed the “Public Choice” Framework by creating the Akzo/Rumpke Exception

The Seventh Circuit in *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.* is the closest the Seventh Circuit has ever come to applying the “remedial canon” of statutory construction.¹⁴⁸ Before *Rumpke* was decided, Section 113 provided a general avenue of recovery for an “innocent landowner” to bring a suit against a PRP for contaminated land.¹⁴⁹ In *Rumpke*, Section 107(a) became the default avenue of recovery for an “innocent landowner.”¹⁵⁰ Furthermore, the Court in *Rumpke* explicitly labeled Section 107(a) as providing for “strict liability” in the context of “innocent landowners” suing a PRP for direct injury.¹⁵¹

The “polluter pays” principle of CERCLA is achieved by ensuring that someone is responsible for cleaning up the contaminated property. The alternative to not allowing an “innocent landowner” with a claim for recovery is for Section 107(a) to be effectively obsolete as a cost-provision of CERCLA.¹⁵² As the Seventh Circuit in *Rumpke* noted, “if one were to read § 107(a) as implicitly denying standing to sue even to landowners like Rumpke who did not create the hazardous conditions, this would come perilously close to reading § 107(a) itself out of the statute.”¹⁵³

B. How the Seventh Circuit in Metropolitan Water Utilizes the “Public Choice” Theory

¹⁴⁸ *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1241-42 (7th Cir. 1997).

¹⁴⁹ *Id.* at 1240-1242.

¹⁵⁰ *Id.* at 1240-1242.

¹⁵¹ *Id.* at 1240-41.

¹⁵² *Id.* at 1241-42.

¹⁵³ *Id.* at 1241-42.

The Supreme Court's attempt in *United States v. Atlantic Research Corp.* to reach the broad goals of CERCLA has pushed it the furthest it has ever come to applying the "remedial canon" of statutory interpretation.¹⁵⁴ First, the *United States v. Atlantic Research Corp.* Court came close to applying "strict liability."¹⁵⁵ Second, the Supreme Court's reasoning showed a clear bias towards promoting settlement with the government rather than voluntary cleanup.¹⁵⁶

The Supreme Court in *Atlantic* justified its earlier holding in *Cooper* that foreclosed a Section 113(f) contribution claim for a PRP who has voluntarily commenced cleanup.¹⁵⁷ In doing so, the Supreme Court denied a potential conflict between the 2 interests of voluntary cleanup and settlement.¹⁵⁸ By affirmatively barring a potential cause of action for contribution, the Court encouraged settlement.¹⁵⁹

Unlike the Supreme Court, the Seventh Circuit utilized the "public choice" theory of statutory construction in *Metropolitan Water* by inviting the EPA to submit an Amicus brief.¹⁶⁰ The EPA was not directly involved in *Metropolitan Water*.¹⁶¹ However, in the amicus brief, the EPA articulated concern over discouraging settlement with the government by allowing additional avenues of recovery.¹⁶² According to the EPA, the PRP would rather litigate than take any immediate action for environmental cleanup.¹⁶³

On the other hand, not allowing additional avenues of recovery would sacrifice the goal of encouraging the real polluter(s) to take

¹⁵⁴ *United States v. Atl. Research Corp.*, 127 S.Ct. 2331, 2339 (2007).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2337-39.

¹⁵⁷ *Id.* at 2337-38.

¹⁵⁸ *Id.* at 2338.

¹⁵⁹ *Id.*

¹⁶⁰ Brief for the United States Environmental Protection Agency as Amicus Curiae Supporting in Support of the United States of America, *Metro. Water Reclamation of Greater Chicago v. N. Am. Galvanizing & Coating, Inc.*, 473 F.3d 824 (7th Cir. 2007) (No. 05-3299).

¹⁶¹ *Id.* at 1.

¹⁶² *Id.* at 1, 3-4, 18-23.

¹⁶³ *Id.* at 1, 3-4, 18-23.

responsibility for pollution. In reply to the EPA's concern, the Seventh Circuit was "sensitive to the EPA's concerns regarding diminished settlement leverage."¹⁶⁴ However, allowing a PRP, who voluntarily commenced environmental cleanup to sue another PRP under Section 107(a) of CERCLA accomplishes the goal of encouraging the real polluter to pay for cleanup.

Furthermore, one of the most important extremes the Seventh Circuit avoided was imposing "strict liability" on PRPs within the narrow context of a PRP cause of action under Section 107(a).¹⁶⁵ Imposing "strict liability" achieves the goal of "making the polluter pay," but fails to encourage the quickest and most cost-effective environmental cleanup. For the Seventh Circuit, it was important to avoid reaching the absurd result of imposing 100 % liability upon a landowner with no legal recourse.¹⁶⁶ Thus, the Seventh Circuit split from the Second Circuit, which allowed the imposition of "strict liability" under Section 107(a).¹⁶⁷ The Second Circuit noted that "strict liability" is not too harsh given the availability of a contribution counterclaim under Section 113(f).¹⁶⁸ To decide otherwise would "impermissibly discourag[e] voluntary cleanup."¹⁶⁹

In doing so, the Seventh Circuit avoided encouraging the landowner to wait to be sued rather than to commence cleanup.¹⁷⁰ This is because strict liability complicates the decision to cooperate by reporting or cleaning up hazardous waste. Under strict liability, the PRP will compare expected shares of cleanup costs with the value of the land because an individual may be held liable for damages

¹⁶⁴ *Metro. Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 837 (7th Cir. 2007).

¹⁶⁵ *Id.* at 837.

¹⁶⁶ *Id.*

¹⁶⁷ *Consol. Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90, 100 (2005).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Metro. Water*, 473 F.3d at 837.

regardless of intent to cause the contamination.¹⁷¹ The PRP will also have to predict the potential solvency of all PRPs over a period of time leading up to and possibly through litigation.¹⁷² Due to the unpredictability of potential liabilities, the PRP will often litigate to recover response costs. Ultimately, an increase in litigation discourages quick and efficient environmental cleanup.

However, unlike some other circuit courts, the Seventh Circuit has never expressly denounced “strict liability” either.¹⁷³ The reason is because the Seventh Circuit wished to preserve all the tools of statutory interpretation under the “public choice” theory.¹⁷⁴

As the Supreme Court in *Cooper Industries, Inc. v. Aviall Services, Inc.* noted, some courts have expressly denounced “strict liability” in order to provide maximum incentives for polluters to reveal knowledge of contaminated property for quick and effective cleanup.¹⁷⁵ Other courts applied strict liability for deterrence purposes.¹⁷⁶ For example, the Seventh Circuit applied “strict liability on PRPs in the “innocent landowner” context in order to make the polluter as opposed to the “innocent landowner” to pay for the costs of

¹⁷¹ Michael J. Gergen, *The Failed Promise of the “Polluter Pays” Principle: An Economic Analysis of Landowner Liability for Hazardous Waste*, 69 N.Y.U. L. REV. 624, 668-669 (1994).

¹⁷² *See id.* at 669-70.

¹⁷³ *Metro. Water*, 473 F.3d at 837.

¹⁷⁴ *Id.*

¹⁷⁵ *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 169-70 (2004); *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-424 (2nd Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349-356 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point, T. & D.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-1306 (9th Cir. 1997); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120-1124 (3rd Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United States v. Colorado & E.R. Co.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Technologies Corp. v. Browning-Ferris Industries*, 33 F.3d 96, 98-103 (1st Cir. 1994).

¹⁷⁶ *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 522 (3rd Cir. 2006); *Consol. Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.*, 423 F.3d 90, 100 (2nd Cir. 2005).

cleanup.¹⁷⁷ Private land ownership is encouraged as potential buyers are no longer deterred from buying a piece of contaminated property while knowing that the polluter would bear the cost of cleanup.

Additionally, the Seventh Circuit's refusal to allow "implied contribution" recovery contrasts with the Eighth Circuit in *Atlantic Research Corp. v. United States*.¹⁷⁸ The Eighth Circuit circumvented the plain language of Section 107(a) to allow "implied contribution."¹⁷⁹ As the Eighth Circuit stated, "if a plaintiff attempted to use § 107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under § 113(f)."¹⁸⁰ By allowing both general cost-recovery and contribution, the Eighth Circuit has strengthened the PRP's claim by providing for "implied contribution" regardless of fault.¹⁸¹ In contrast, the Seventh Circuit shied away from the kind of judicial activism necessitated by use of the "remedial canon" of statutory construction to ensure the costs of cleanup are borne by those who are responsible.¹⁸²

Similarly, the Seventh, Eighth, and Second Circuit's narrow holdings are contrasted with the Third Circuit in *E.I. DuPont Nemours & Co. v. United States*.¹⁸³ Unlike the Seventh Circuit, the Third Circuit in *E.I. DuPont* refused to allow an avenue of recovery under Section 107(a).¹⁸⁴ For the Third Circuit, an avenue of recovery would discourage settlement with the government.¹⁸⁵ However, not allowing

¹⁷⁷ *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1240 (7th Cir. 1997); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

¹⁷⁸ *Atl. Research Corp. v. United States*, 459 F.3d 827, 835-36 (7th Cir. 2006); *Metro. Water*, 473 F.3d at 836.

¹⁷⁹ *Atl Research*, 459 F.3d at 835-36.

¹⁸⁰ *Id.* at 835.

¹⁸¹ *Id.* at 835-36.

¹⁸² *Metro. Water*, 473 F.3d at 835-837.

¹⁸³ *Atl. Research*, 459 F.3d at 836-37; *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 543 (3d Cir. 2006); *Consol. Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 103-04 (2d Cir.2005); *Metro. Water*, 473 F.3d at 837.

¹⁸⁴ *E.I. DuPont*, 460 F.3d 515 at 543.

¹⁸⁵ *Id.*

such an avenue of recovery would be directly against creating incentives for voluntary private party cleanups.¹⁸⁶ To the extent that opening up another narrow exception would increase litigation, the broad goal of encouraging fast and efficient cleanup is accomplished by encouraging a PRP to voluntarily commence cleanup. Furthermore, the “polluter pays” principle is furthered when a PRP recovers costs from other PRPs.

CONCLUSION

The Seventh Circuit’s “public choice” theory offers the best interpretation of CERCLA because it furthers the two different and conflicting goals of CERCLA. Courts want to encourage clean up of hazardous waste sites quickly and effectively. However, Courts also want to ensure that the polluters bear the costs for cleaning up the hazardous condition. As such, the existence and degree of conflict between the two goals of CERCLA will be dependent upon the particular factual circumstances and legal context. Each court construing CERCLA in a particular factual circumstance and trying to further a particular goal, must be aware of competing interests. The “public choice” theory offers the solution in each circumstance because legislation is a product of compromise that requires reaching a middle-ground among competing interests.

While the Seventh Circuit is the only circuit that employs the “public choice” theory with regard to CERCLA interpretation, it has done so to reach the most equitable results. For example, in *Akzo* and *Rumpke*, the Seventh Circuit was the first court to address the issue of Section 107(a) recovery for either an “innocent landowner” or a PRP. In creating the “*Akzo/Rumpke*” “innocent landowner” exception and imposing “strict liability” on PRPs, the Seventh Circuit advanced the “polluter pays” principle of CERCLA.

Metropolitan Water represents a classic application of the “public choice” theory. The Supreme Court’s arresting remiss of directive in either statutory construction or principle on the issue of PRP liability

¹⁸⁶ See Gergen, *supra* note 171, at 672-73.

left the Seventh Circuit and many circuit courts in a precarious situation. In affirmation of *Akzo* and *Rumpke*, the Seventh Circuit carved out another narrow exception within Section 107(a) for PRPs, who had voluntarily commenced cleanup. In doing so, the Seventh Circuit encouraged quick and effective cleanup. The Seventh Circuit also avoided the extremes of some other the circuit courts by not imposing “strict liability” on PRPs or labeling cost recovery under Section 107(a) as “implied contribution.” Applying the “public choice” theory, the Seventh Circuit has continuously expanded the interests of all environmentally aggrieved parties.